still owing. Consequently, the Collector's order for sale must be varied by deleting the words "less $960" and will therefore be, "Order for the sale of the lands for the recovery of $3,000 and costs."

With regard to the costs of this application, it appears that the chargor was in no way to blame. Mr. Seenivasagam does not press for costs and I accordingly make no order as to costs.

*Application allowed.*

---

[261] STRAITS SETTLEMENTS REPORTS

PUBLISHED BY AUTHORITY

## DORAI MANICKAM alias DAVIS v. REX

[A. Cr. J. (Whitley Ag. C.J., Adrian Clark J. and Cobbett Ag. J.) August 31, 1936]

[Singapore D. C. Criminal Appeal No. 29 of 1936]

*Criminal Procedure — Misjoinder of charges — Acquittal of accused — Subsequent trial on same charge — Autrefois acquit — Criminal Procedure Code, ss.287, 312A.*

Owing to a misjoinder of charges, the prosecution did not proceed with one charge in respect of which the District Court made an order of acquittal. At a later stage in the proceedings the remaining charges also were not proceeded with and, in respect of them, an order of discharge was made. In a subsequent trial on the charge on which the accused was recorded to have been acquitted, the defence raised a plea of previous acquittal and the District Judge rejected the plea.

**Held:** on appeal, that the misjoinder of charges in the previous trial did not render the whole proceedings void *ab initio* and a nullity.

**Held further:** that the plea of *autrefois acquit* was in all the circumstances of the case well founded.

**Held also:** that the where a party to criminal proceedings who has had the opportunity to appeal under section 293 or 295 of the Criminal Procedure Code neglects, without very good reasons, so to do, he will not be allowed to call in aid the High Court's revisionary powers under section 312A of the Code; and that where it is proper that application be made to the Court to exercise its powers under the last mentioned section the application should be made at the first possible moment.

APPEAL from an order of the Criminal District Judge dated the 26th day of May, 1936. The appeal was heard before a Court of three Judges consisting of Whitley Ag. C.J., Adrian Clark J., Cobbett Ag. J. on June 22, 24 and 26, 1936, when at the conclusion of the hearing of appeal the President of the Court delivered an oral judgment allowing the appeal. The Court intimated that in view of the importance of the points raised, they would record their reasons in writing later.

The facts and arguments appear sufficiently from the grounds of judgment below.

*Tampoe-Phillips* for the appellant.

*Worley* (Solicitor-General) for the Crown (respondent).

On the 31st day of August, 1936, the following grounds of judgment were read by —

**Adrian Clark J.:** In this case the appellant was brought before the District Court in July of 1935 on a charge sheet containing two charges.

The case was conducted on behalf of the Crown by a firm of solicitors who were feed by the complainants but authorised under section 384 of the Criminal Procedure Code to act for the Public Prosecutor.

The accused was remanded for trial and, on the day on which the trial commenced, a third charge was added to the charge sheet. This third charge cannot be traced on the records of the District Court and the usher of the Court has stated on oath that he returned it to the solicitors for the prosecution. This seems to show some practice, or lack of it, in the District Court which should immediately be remedied. It is essential that in all criminal trials, in whatever Court they take place, charges should be formally drawn up, recorded and preserved.

This third charge seems, from what appears in the notes of evidence, to have been one charging criminal breach of trust of a sum which was the aggregate of many sums (presumably not including that in the first charge) alleged to have been misappropriated during one year, details being given of the individual misappropriations making up the aggregate. Whether such a charge really complies with the provisions of section 159(2) of the Criminal Procedure Code may be open to doubt but the point is not before us.

For the purposes of this appeal it is agreed that this third charge, and its addition to the first two, can have no bearing on the points at issue.

After several hearings and the recording of a mass of evidence from a large number of witnesses the Crown closed its case. The advocate for the defence then took the objection (*inter alia*) that the "whole of the prosecution was bad for misjoinder" because the second charge in the charge sheet alleged the commission of an offence of criminal breach of trust on the 5th January, 1934, while the first charge alleged the commission of an offence of the same kind on the 13th March, 1935. There was therefore between these dates a period of time greater than the space of twelve months permitted under section 170(1) of the Criminal Procedure Code.

The advocate at that time appearing for the Crown resisted all the submissions of the advocate for the defence and, in the result, the learned District Judge ruled that "the charges are legal and there is a case to meet on all three charges."

The accused then gave evidence on oath throughout the remainder of that day and during part of another day's hearing.

[262] While his evidence was still progressing, [262] however, the advocate for the Crown, according to the note of the learned District Judge, "interposed to say that the Deputy Public Prosecutor.....considers charge II contravenes section 170(1), Criminal Procedure Code and that he will not further prosecute on that charge."

In other words the Deputy Public Prosecutor purported to act under section 182 of the Criminal Procedure Code under which section the Court is thereupon empowered either merely to discharge or else to acquit as well as to discharge the accused.

In this case the accused was acquitted of the second charge and the trial then proceeded upon the first and third.

After the Court had adjourned, and had resumed after the adjournment, the advocate for the defence raised the point as to wehther or not the trial could be proceeded with or should commence again *de novo*; and a further adjournment was then taken so that this point might be considered.

At the subsequent hearing the advocate for the defence claimed that the accused should be discharged from or acquitted of the remaining charges. The Deputy Public Prosecutor attended the hearing and, after discussing the point, stated that he "preferred to act under section 182 of the Criminal Procedure Code" and therefore announced that he would not further prosecute on charges I and III, and asked for an order of discharge not amounting to an acquittal. Such an order was thereupon made by the learned District Judge and the accused was discharged.

On the 30th April, 1936 the appellant was again charged before the District Court with the offence which had been set out in the second charge at the previous trial and on which an order of acquittal had been made. No other charge was on this occasion made against him beyond the fact that the offence was charged in several alternative ways which, it is admitted, it is not material to consider.

The accused thereupon set up a plea of previous acquittal in accordance with the provisions of sections 287 and 288 of the Criminal Procedure Code. The issue raised by this plea was accordingly tried and in the result the learned District Judge rejected the plea and ordered that the trial should proceed.

It is from that order that the appellant has appealed to this Court.

The submission of the learned Solicitor-General which succeeded before the learned District Judge and which was repeated before this Court was to the effect that the misjoinder of charges at the previous trial rendered the whole proceedings void *ab initio* and a nullity so that there never really was a trial at all, and that the trial of the charge which was brought before the District Court in 1936 was, therefore, the first and only lawful trial of that charge.

In support of his submission the learned Solicitor-General cited many decisions of the English and of the Indian Courts. We are always prepared to study such authorities with interest and with respect but, with the exception of decisions by the Judicial Committee of the Privy Council and, in some cases, of the House of Lords, these authorities are not binding on us; we must, in any event, before accepting them, be satisfied that they deal with the same problem as that which we are called upon to solve in the case in which these authorities are cited to us.

Our criminal procedure, though substantially similar to that of the Courts in England, differs from it in many respects and is laid down in a comprehensive written Code.

The plea of the accused in this was made not in exercise of a Common Law right but under the Criminal Procedure Code of this Colony. If the provisions of that Code can be clearly interpreted there is no need to go to English or even to Indian authorities, and it would be wrong to do so for the purpose of supplementing or restricting the natural meaning of the provisions of the Code.

Section 287 of the Code lays down what are the ingredients necessary to a good plea of previous acquittal and section 288 lays down the procedure for putting forward such a plea and for adjudicating on it. The ingredients of a good plea necessitate proof —

(1) that the person pleading it is identical with the person previously tried;

(2) that the charges are identical (or, if the charges differ, that the facts are such as would have enabled the second charge to have been dealt with at the first trial under the provisions of sections 172 and 173 of the Code);

(3) that the person was tried and acquitted;

(4) that the Court was a "Court of competent jurisdiction" and

(5) that the acquittal "remains in force."

It was admitted that no question arises, in this case, in connection with sub-sections (2), (3) and (4) of section 287 of the Code. It was further admitted that the first and second ingredients, of those we have referred to, existed in this case. Provided the Court could be said to be "a Court of competent jurisdiction" we understood the learned Solicitor-General also to admit firstly that the accused had been "tried," (since a man who has been charged before a Court of competent jurisdiction and thereafter acquitted by that Court has clearly been 'tried," whatever [263] may be [263] the ground of the acquittal) and secondly, that the acquittal "remained in force" (since the Crown took no steps to have the order of acquittal set aside or varied by appeal under section 293 or on revision under section 312A of the Code).

The main submission of the learned Solicitor-General was that the effect of the misjoinder of charges must be to take away from the District Court its character as a Court of competent jurisdiction and therefore that the trial before it was a nullity and the record of acquittal a mere piece of waste paper.

It is true that this might be the legal position had the first trial purported to be a trial by a Police Court which has, in law, no greater jurisdiction to deal with the charges laid against the accused than would have the committee of a cricket club.

If a Court, however, has jurisdiction in law to deal with a charge, does the fact that the charge is not presented in proper legal form result in the Court itself ceasing to exist as "a Court of competent jurisdiction"? We think not. The Court may be competent to deal generally with a matter before it, although it is not competent to make some particular order in that matter for the reason that it would be illegal to make that particular order. The only jurisdiction of any Court is a jurisdiction to do justice according to law and, to that extent, the Court is not "competent" to make any order not justified by law. When a conviction is quashed on appeal it is quashed because that conviction was for some reason illegal, because the order of conviction was one which the Court of trial was, to that extent, not "competent" to make; but the quashing of a conviction does not necessarily show that the Court of trial could be said not to be "a Court of competent jurisdiction."

If I understood the learned Solicitor-General correctly he argued that any illegality in a trial rendered the whole proceedings null and void *ab initio*. If that is so, then a man might be tried, convicted and sent to prison by the District Court and the Crown could nevertheless prosecute him and get him sentenced all over again by the same Court provided that it could persuade the Judge of that Court that, although the accused had not appealed on the first conviction, his conviction would have been quashed by the Court of Appeal if he had chosen to do so. If this is so then every subordinate Court can in effect usurp the powers of the appropriate Appeal Court by reversing its own judgments and orders in contravention of the provisions of section 267(1) of the Code.

As a basis for his submission the learned Solicitor-General relied upon the well known case of *Subramania Ayyer* v. *Rex* (28 I.A. 257). That case, however, is authority for no more than this: that where there has been a joinder of charges not permitted by section 170 of our Code and a conviction has resulted, the misjoinder is not an irregularity which can be ignored under section 428 of our Code but is an illegality that must result in the quashing of the conviction. The Judicial Committee in *Subramania Ayyer's* case did not say that the trial itself could be treated as a nullity and the accused proceeded against *de novo,* nor has our attention between drawn to any decision, following *Subramania Ayyar's* case, in which that proposition has been laid down.

Some observations in the case of *Kamal Kutty* v. *Raja of Chirakkal* (I.L.R. 36 Mad. at p. 284) suggest that the opposite view has been held in India and, indeed, the decisions of the Indian Courts, since the ruling in *Subramania Ayyar's* case was reported, have tended, on the whole, narrowly to confine the application of that ruling to cases which come within its four corners. The decision of the Indian High Court in *Mukand Singh and others against the King Emperor* (I.L.R. 8 Lahore 230), with which decision the Judicial Committee declined to interfere, is one which indicates this tendency.

The learned Solicitor-General also called in aid the well known decision of the House of Lords in *Crane's case* ([1921] App. Cas. 299) where a *venire de novo* was granted. The dissenting opinion of Lord Finlay in that case merits some consideration, and if the opinions of the majority be carefully examined it will be seen that the decisions really proceeded on the assumption that Crane and his fellow prisoner Morton had been jointly tried, not on an imperfect indictment, nor on two separate indictments improperly tried together, but on some third indictment which had been thought by the trial Court to exist but which, in fact, had never existed at all. If a man had been "tried" on an indictment which has never in fact existed then it is obvious that his "trial" may be considered a nullity: the position is not necessarily the same if it is clear that he has been tried on an existing charge which charge, however, is technically unsound.

We are bound by the decision in *Subramania Ayyar's* case and we are prepared to apply that in *Crane's* case if and where it is applicable to our local procedure; but we are not prepared to extend the effect of those decisions beyond what they clearly lay down.

The learned Solicitor-General further submitted that the real test was whether the accused in the former case could, at any stage of his trial, have taken a fatal objection to the proceedings. That is a test laid down in decisions of the English Courts but not reproduced in our Code. [264] Even if it could be taken as explaining what the Legislature meant by the phrase "a Court of competent jurisdiction" the test would fail. Had the accused at any point in the proceedings, before conviction, (as he in fact did, at the close of the case for the prosecution) taken objection to the misjoinder, that objection would not have been fatal to the proceedings since the learned District Judge could have cured the misjoinder by altering or amending the charges against him; in this case either by striking out the second charge and proceeding upon the first and third only or, alternatively, by striking out the first and third and by proceeding on the second only. The learned Solicitor-General has reminded us that there are decisions of the Indian Courts which say that such an amendment ought not to be made later in the course of the trial. The provisions of our Code on this point, however, are clear. A charge may be altered or added to at any time before judgment (section 164). If the new or altered charge may, in the opinion of the Court, prejudice either party a new trial may be directed (section 166) but otherwise the trial proceeds (subject to the provisions of section 168) either without or after an adjournment (sections 165 and 166). [264]

We have no doubt that under our Code, a Court can amend a charge by striking it out entirely and by substituting a different charge: but if any authority for this proposition were required it could be found in the case of *Reg.* v. *Dorasamy Pillay* (4 Ky. 405). The Indian case of *Chetto Kalwar* v. *Emperor,* (I.L.R. 49 Calc. 555) also illustrates the proposition that a Court may cure a misjoinder by striking out, before verdict, the charge or charges giving rise to the misjoinder.

Where the amendment of the charge results in evidence having been recorded by the Court which would be inadmissible on the charge as amended the Court will usually prefer to direct a new trial; but where, as in this case, all the evidence given would remain relevant and admissible, after the technical defect in the charge had been cured, there would be no need to order a new trial. Trial could proceed on the amended charge, and conviction or acquittal on that amended charge would be valid. The ruling of the learned District Judge, when the objection was taken, appears to have been erroneous, but the fact that a Court which is competent in law to make a correct order or ruling proceeds to make an incorrect one cannot prevent the Court from remaining one of competent jurisdiction.

The same comment applies to the order of the learned District acquitting the accused instead of merely discharging him or of striking out the charge and making no other order on it.

The order of acquittal may have been wrong, although it must be remembered that it was made after the whole of the evidence for the prosecution and some of the evidence for the defence had been given and after the Deputy Public Prosecutor had chosen to exercise powers conferred upon him by the Criminal Procedure Code which, in their turn, evoked powers in the Court to discharge or to acquit at its discretion. That is not, however, a matter which we can now decide. If the Crown wished to challenge the propriety of the order of acquittal its advisers could have done so by way of appeal under section 293 of the Code or by way of an application to the High Court to revise under section 312A. In the absence of such proceedings the order of acquittal cannot be got rid of by the indirect way of asking the very Court that made it to rule that it was bad, and it is therefore an order of acquittal which "remains in force."

It may be well to point out how carefully our Criminal Procedure Code differentiates between an order of mere "discharge" and one of "acquittal." Where there is an order of "acquittal" the order of discharge follows as a matter of course but the bare order of "discharge" is that appropriate to cases where the Court intends to make no decision "on the merits." Reference to the provisions of sections 147(1); 176; 178(f), (g), (m) and (n); 182; 215; 243; 248(5); 303(b)(i); 312B; 355; and 387(1), clearly brings out this distinction. This distinction between acquittal and bare discharge does not appear to be formally recognised in modern English procedure although it is to be found in *Vaux's* case, decided in the 16th century. This case was cited to us as constituting some authority for the proposition that a man could be tried again on a charge of which he had been acquitted. A careful study of the report in *Coke* (76 E.R. p. 992) shows, however, that the accused was, at the first trial, discharged without any judgment having been entered and that the only order of the Court was "*quod et sine die.*" In the Indian case of *Re Dudekula Lal Sahib,* I.L.R. 40 Mad. 976, 986) it was pointed out that the law of India differed, on the subject of acquittals, from that in England. Under our Code also, there can be no doubt that orders made under section 176 or 248(5) could be pleaded in bar of subsequent proceedings although there would have been no "trial on the merits."

Certain Indian cases which were cited as authority for the proposition that *autrefois acquit* cannot be pleaded where the previous trial was irregular, namely, *Ra'mi Reddi's Petition* (I.L.R. 3 Mad. 48), *In re Samsudin* (I.L.R. 22 Bom. 711), *Abdul Ghani* v. *Emperor* (I.L.R. 29 Cal. 412) and *Manji Janam Bhate's Application* (A.I.R. 1929 Nagpur 161) on examination all prove to be cases in which the Court had never had [265] the power, in law to take cognizance of the particular offence. There can be no doubt that if a Court purports to try a charge which the legislature has not empowered it to try any verdict given by that Court is a nullity. That is not the position here, and the only local decision which is in point is in favour of the appellant. In *Reg.* v. *Monteiro* (1889, 4 Ky. 556) an accused charged by a private prosecutor with assault was discharged by the Magistrate upon the complainant stating that he did not wish to go on with the case. The police thereupon summoned the accused for the same assault and he successfully pleaded a previous acquittal. On appeal by the Crown, Wood Ag. C.J. held the plea to have been good and dismissed the Crown's appeal.

There is another point. In order to found his contention that the first trial was a nullity because of defects in its procedure the learned Solicitor-General has had to refer to the notes of evidence taken at that trial. It is at least doubtful whether the Code allows that to be done. To establish the previous acquittal all that the accused had to do was to produce a certified extract of the record, under section 409(1)(a) of the Code. Section 288(3) of the Code allows the depositions and Judge's notes, and presumably the Magistrate's notes also in the case of a summary trial, to be produced in order "to prove or disprove the identity of the charges." The permission to use the record of the evidence for only this one specific purpose can be construed as showing that they cannot be used for any other purpose. If the bare record had been produced in this case it would in fact have shown an acquittal on one charge and a discharge on the others which were misjoined with it; there would therefore be nothing on the face of the record to show any imperfection in the verdict of acquittal.

For all these reasons we held that the appeal succeeded; that the plea of previous acquittal had been made out by the accused in the Court below; and that the order of the learned District Judge must be reversed and an order substituted therefor that the plea in bar was good and that the accused be discharged.

While stating that we would, as we have now done, record our reasons in writing, we announced this decision at the hearing, whereupon the learned Solicitor-General made an oral application to the Court to exercise the powers that it possesses under section 312A of the Code and, the record being before it, to revise the order of acquittal recorded by the learned District Judge at the first trial, and to substitute therefor an order of discharge so that the Crown might be enabled to charge the accused for the third time in connection with this one offence.

Now, whatever may be the law of England as to pleading previous convictions no case has been cited to us in which a further trial was held after an acquittal. Reference has already been made to the *ratio decidendi* in *Vaux's* case. In the case reported in *Jenkins* as "*Case 8*" 145 E.R. 5 there had also probably judgment entered. In *Reg.* v. *O'Brien & anor.* (1882, 15 Cox 29) the subsequent trial was for an offence essentially different in law.

On the other hand *dicta* to be found in other cases which were cited to us demonstrate the unwillingness of the English Courts to allow the Crown to prosecute a man again on a charge on which a verdict of acquittal has been recorded in his favour. In *Reg.* v. *Russell* (3 E. & B. 942) Lord Campbell C.J. is reported as saying: "If there be an improper conviction it should be set aside but I hope the same practice will never prevail in the case of an acquittal." In *Rex* v. *Simpson,* ([1914] 1 K.B. 66) Bailhache J. stated that

he knew of no case in which an acquittal had been quashed by *certiorari* except where there was a defect apparent on the face of the record and added that the Supreme Court ought not to interfere where the adjudicating tribunal was apparently competent — but only where the tribunal was of obviously incompetent jurisdiction or was exercising a jurisdiction manifestly in excess of its powers. In *R.* v. *Marsham,* ([1912] 2 K.B. 362) also while the Court agreed that a plea of *autrefois convict* had been, in the circumstances of that case, properly rejected, Lord Alverstone C.J. said that "if the defendant had been acquitted on the first hearing very different considerations would arise."

So far as there is a discretion in this Court to review or not to review proceedings under section 312A of the Code that discretion clearly ought not, in the circumstances of this case, to be exercised in favour of the prosecution. The Crown was free to charge the accused as it pleased and it chose to charge him on a charge sheet which illegally joined this charge with others; when the point was taken by the defence it opposed the submission and persuaded the learned District Judge to overrule it; when it afterwards admitted the error it chose to adopt procedure which invited the learned Judge to exercise a discretion in discharging or acquitting; when he in fact acquitted, the Crown made no protest and subsequently neither appealed as it has power to do under section 293 of his Code nor applied to this Court for revision but preferred to proceed in a manner which again was erroneous. This Court should certainly not go out of its way to give the prosecution yet another chance to brush aside all the errors it has made in procedure and thereby put the accused for a third time on his trial.

[266] [266] It is not desirable or possible to lay down hard and fast rules as to when this Court will or will not exercise its powers of revision under section 312A of the Code. Each case must be decided according to its own circumstances. It may, however, be laid down as a broad and general rule that where a party to criminal proceedings has had the opportunity to appeal under section 293 or section 295 of the Code but neglects, without very good reasons, so to do he will not be allowed to invoke the provisions of section 312A and, moreover, that where it is proper that application be made to the Court to exercise its powers under that section the application should be made at the first possible moment and not merely as a forlorn hope after other methods of procedure have been unsuccessfully adopted.

In all these circumstances we refused the application that we should exercise our powers under sections 312A and 312C and the appellant was therefore finally discharged.

*Appeal allowed.*

---

## *In re* A CONTRACT BETWEEN WEE POH NEO AND GOONA VEERAGOO NAIDOO

**[O.C.J. (Adrian Clark J.) September 4, 1936]**
**[Singapore Originating Summons No. 121 of 1936]**

*Trustees Ordinance, s.15, sub-s.2 — Sole trustee — Valid receipt for capital moneys arising under trust for sale of land — Position of purchaser from executor.*

The powers under which an executor sells for the purpose of paying debts &c., do not constitute "an immediate binding trust for sale" within the meaning of the Trustees Ordinance.

If a sale is effected to produce funds to pay funeral or testamentary expenses or the debts of the deceased, then a single executor may give a valid receipt. If the proceeds of sale are to be employed as capital moneys impressed with the objects of the trust then they must be paid to no less than two trustees and no receipt given by only one trustee will be a good discharge to a purchaser.

If a single executor purports in selling to be acting as such and to be selling for the purpose of paying the testator's debts or his funeral expenses, the purchaser is not put further on enquiry and is safe if he has no notice that the vendor's representations are untrue, at any rate during a period of six years after the testator's death.

*Re Tambi bin Osman,* (1929) S.S.L.R. 186 considered and followed.

VENDOR AND PURCHASER'S SUMMONS.

*K. T. Ooi* for the vendor (executor).

*Laycock* for the purchaser.

The facts and arguments sufficiently appear from the judgment.

*Cur. Adv. Vult.*

**Adrian Clark J.:** This is a vendor and purchaser's summons taken out under the provisions of section 4 of the Conveyancing and Law of Property Ordinance.

The facts have been set out in a statement of agreed facts which was filed in the matter and which may be taken to be incorporated in this judgment as introductory matter.

The declarations asked for in the summons are "that the requisition and objection in respect of the ability of the said Wee Poh Neo to give a valid receipt for the proceeds of sale of the land and premises comprised in the abovementioned contract of sale have been sufficiently answered by the applicant the vendor" and "that a good title to the said land and premises has been shown in accordance with the particulars and conditions of sale contained in the abovementioned contract."

An executor has always been regarded by the Courts of Equity as holding the property of the deceased in a fiduciary capacity and as being in effect a trustee.

The primary duty of the executor is to realise so much of the assets of the deceased as will pay the debts and funeral and testamentary expenses of that deceased. Thereafter he holds the property in trust for the beneficiaries under the will.

For the purposes of the Trustees Ordinance that Ordinance expressly provides, in section 2(1), that an executorship shall be included, except where otherwise provided, in the application of the provisions of that Ordinance to trusts. Section 3 of the Ordinance, again, defines the word "trust" as including in that Ordinance (unless the context otherwise requires) "the duties incident to the office of a personal representative," and "trustee" as including a personal representative.

Now section 15 of that Ordinance, as originally enacted, provided by subsection (1) that a trustee might give, for any money payable to him under any